COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

In the Matter of the Investigation by the Department of Public Utilities upon its own Motion Commencing a Notice of Inquiry/Rulemaking Establishing the Procedures to be Followed in Electric Industry Restructuring	)))))	Docket No. D.P.U. 96-100

INITIAL COMMENTS OF THE CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT

The Center for Energy and Economic Development ("CEED") is a non-profit organization formed in 1992 to educate the public and policy-makers about the new technologies, broad economic benefits, and environmental compatibility of coal when used to generate electricity and in other industrial applications. CEED's membership is drawn from the broad and diverse spectrum of entities sharing an interest in some aspect of the United States coal industry. CEED's members include companies and individuals who work in coal production, transportation, and utility and non-utility electric power production nationwide. In particular, many of CEED's members are directly involved in generating power, and supplying fuel and fuel transportation services to electric power generators serving the needs of electric customers located within Massachusetts and the New England region. As such, CEED's members have a significant interest in this Rulemaking and are grateful for the opportunity to participate in this important and historic proceeding. CEED commends efforts underway within the Department of Public Utilities (the "Department") and the Commonwealth of Massachusetts (the "Commonwealth") to undertake a comprehensive, yet industry-inclusive, Rulemaking that will provide the essential underpinnings for the

future structure of the electric services industry within the Commonwealth.

As set forth in the Department's March 15, 1996 order commencing this rulemaking proceeding (the "Rulemaking"),[1] the Department has received restructuring plans from four companies that operate under its jurisdiction: Boston Edison Company ("BECo"), Eastern Edison Company ("Eastern Edison"), Massachusetts Electric Company ("MECo"), and Western Massachusetts Electric Company ("WMECo").[2] In addition, on February 13, 1996, the Division of Energy Resources ("DOER") filed its own proposed plan for restructuring the electric industry.[3] The scope of this Rulemaking proceeding is intended to focus on issues pertaining to (1) market structure, (2) market power, (3) transmission, (4) distribution, (5) stranded cost calculation and recovery mechanisms, (6) rate unbundling, (7) performance-based ratemaking, (8) environmental regulation and demand-side management, (9) default service, (10) universal service, (11) the effect of restructuring on municipal electric companies, and (12) the local and utility tax impacts of restructuring. Representatives of CEED have reviewed the above referenced restructuring plans relative to the issues under consideration in this Rulemaking and has concluded that, at this time, CEED will focus these initial comments solely on the issues raised relative to environmental regulation.

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[1]See, Order Commencing Notice of Inquiry ("NOI")/Rulemaking and Setting a Procedural Schedule, D.P.U. 96-100, dated March 15, 1996.

[2]The BECo, Eastern Edison, MECo and WMECo restructuring plans are filed pursuant to the Department's August 16, 1995 Order in Electric Industry Restructuring, D.P.U. 95-30, setting forth principles for a restructured electric industry and establishing a schedule for electric utilities to file restructuring proposals. Those proposals are docketed as D.P.U. 96-23, D.P.U. 96-24, D.P.U. 96-25 and D.P.U. 96-26, respectively, and are incorporated by reference in this Rulemaking.

[3]The DOER proposal was filed under docket no. D.P.U. 95-30, which was terminated by the March 16, 1996 Order establishing this Rulemaking. All filings received in D.P.U. 95-30 after the August 16, 1995 issuance date of that order are incorporated by reference in this Rulemaking.

CEED reserves its right to comment on any of the above issues at a later date consistent with the schedule and procedures set forth in the Order.

DISCUSSION

CEED advocates and supports low-cost energy options that result in economic development, competitiveness and rising standards of living. The future structure of the electric industry must continue to serve the overall public interest by ensuring continued universal access to reliable and safe electric service in a manner that complies with the economic, environmental and social goals of the Commonwealth.

Although movement toward a more competitive and efficient energy services industry is both desirable and inevitable, the issues raised are as complex as their proposed solutions will underscore. That is not to say that regulatory reform should be stifled or deferred because of the challenges inherent to progress. It is merely to urge a careful and comprehensive understanding of both the issues and the consequential impacts of the solutions before a new market-based or regulatory approach is embraced and enacted.

In this regard, both the MECo and DOER plans endorse the development of uniform environmental standards by the Commonwealth that would be imposed upon competing sellers of power to retail customers.[4] These standards would be consistent with those that the Commonwealth would impose upon generation stations physically located within the state. This approach is often referred to as "environmental

[4]See, Choice: New England, The NEES Companies' Proposal for Restructuring the Electric Utility Industry, Testimony, February 1996; D.P.U. 96-25; Testimony of Jeffrey D. Tranen; pp. 81-83. See also, Power Choice, A Plan to Deregulate Elements of the electric Industry in Massachusetts, submitted by the DOER; D.P.U. 95-30; pp. 31-32.

comparability." Proponents of environmental comparability assert that the objectives of such an approach are to (1) enhance the goal of air quality improvement within the Commonwealth and (2) to level the competitive "playing field," which they assert has been rendered askew due to the existence of less stringent air quality standards in states that are "upwind" of the Commonwealth.

CEED contends that the adoption of comparable environmental standards does not further state economic and air quality objectives, and that:

> the imposition of inappropriate restrictions, standards or tariffs on the Commonwealth's electric market could eliminate the economic advantages of federal open access wholesale transmission policy and state electric industry restructuring initiatives *without* providing the desired environmental benefits; and
>
> the imposition of such restrictions, standards or tariffs on out-of-state suppliers for competitive purposes encourages an interstate commerce challenge that could significantly delay state efforts to implement regulatory reform initiatives.

A key aspect of maintaining economic energy sales will be the ability of resource aggregators to procure diverse, reliable supplies of electricity at a competitive cost. Market restrictions or government mandates have the potential to negatively impact the ability of aggregators to meet the cost and reliability criteria necessary to compete efficiently. Thus, restrictive mandates should only be used cautiously, sparingly and wisely where they are (1) absolutely required, (2) guaranteed to achieve the desired result, and (3) justified by sound economics, science and in law. Otherwise, the ability of markets to perform efficiently and effectively will be compromised, resulting in higher in-state electric rates and thwarted economic growth.

A. Imposition of comparable environmental standards on suppliers to Commonwealth retail markets will result in higher prices and thwarted

economic growth without providing the desired environmental benefits.

On page 31 of its plan, the DOER points out that the Department's August 16, 1995 order observed "[i]f different environmental requirements are imposed on similar generators or groups of generators...competition may be distorted." As a result, the DOER proposal specifically envisions a restructured electric services industry where agreements between utilities, the Massachusetts Department of Environmental Protection ("DEP"), and other parties will be pursued to achieve a more level playing field for generation suppliers located within and outside of the Commonwealth. In testimony submitted before the Department on March 28, 1996, Commissioner David O'Connor underscores that the DOER's "Power Choice" plan specifies that emission reductions that are adopted by the DEP must be achieved by each generation owner's portfolio and that "all reasonable means to apply these same standards to competing sellers of power to Massachusetts' retail customers whose portfolio of generation sources include plants outside of Massachusetts" should be pursued.[5]

In fact, the federal Clean Air Act ("CAA") establishes nationwide standards for generators that are consistent from state to state, thus providing a level regulatory "playing field" as a statutory baseline. The United States Congress, in enacting this legislation, did recognize that uniform environmental conditions do not exist due to a myriad of different factors, including such issues as the density of population, industrial concentration or the density and nature of local vegetation. The CAA does, therefore, provide state regulators with the authority to set more stringent standards for projects located within their jurisdictions if local air quality conditions warrant such an action.

[5]See, Testimony of David L. O'Connor of the Division of Energy Resources Before the Department of Public Utilities on *Power Choice*: A Plan to Deregulate Elements of the Electric Industry in Massachusetts, March 28, 1996; docket no. D.P.U. 96-100; pp. 7-8.

Hence, any perceived distortions in the level playing field are not due to federal grandfathering of resources located in other parts of the country. Instead, they result from the imposition of additional emissions control requirements that the Commonwealth DEP has determined are necessary to meet federally established air quality standards within its jurisdiction.[6]

Emissions disparities between vintage and newer electric generating resources have always existed, as has the disparity in ambient air quality conditions from location to location. The economics of new technologies, relative to operations and emissions performance, justify new investment in the energy generation infrastructure, particularly in light of the nationwide emissions performance objectives agreed to and adopted by

[6] For example, the inability of northeastern and mid-Atlantic states to meet National Ambient Air Quality Standards for ozone in specific counties within the region is a location-specific air quality concern addressed in the Clean Air Act Amendments of 1990 ("CAAA") through the establishment of the Ozone Transport Region ("OTR"). The OTR is an area composed of 12 northeast and mid-Atlantic states, plus the District of Columbia. OTR state representatives typically environmental officials) constitute members of the Ozone Transport Commission ("OTC"), which convenes to study, collaborate and recommend ozone control strategies on a consensus basis. The control of major local stationary sources of nitrogen oxides ("NOx") were determined, by the OTC, to be a primary ozone control component in part because it was believed that plans for vehicular emissions reductions (many of which have not moved forward) would provide sufficient control of volatile organic compounds ("VOCs"). Under the right conditions, NOx and VOCs are thought to be precursors that combine to form ozone.

Consequently, the OTC developed the NOx Memorandum of Understanding ("MOU"), dated September 29, 1994, which establishes a control strategy that could reduce average NOx emissions from major stationary sources in the OTR by as much as 75 percent by the year 2003. The strategy requires reductions from industrial and utility fossil fuel-fired boilers with heat input rates of at least 250 mmBtu/hr. The plan includes two NOx reduction phases (the two phases are referred as Phase II and III, whereas Phase I generally refers to pre-existing emissions reductions requirements contained in the CAAA) and two NOx control zones. The two zones provide for different emissions reductions levels for Phase II due to differences in ambient air quality conditions within the OTR region. Thus, even the MOU appropriately does not establish uniform environmental standards unless Phase III must be implemented to attain the federal ozone standard.

Congress in the Clean Air Act Amendments of 1990 ("CAAA"). As the generation market becomes de-linked with a particular retail franchise, existing federal and state environmental regulation will begin to incentivize new generators to select economically-efficient locations from, among other things, an environmental perspective. The adoption of "equal" emissions standards, in a world where diverse environmental conditions exist, removes any incentive to site or retrofit major sources of air emissions in an environmentally-efficient manner. In addition, an environmental benefit is produced when a significant emissions source, such as a power plant, is located far away from areas where local air quality problems may be exacerbated by local power generation unless, of course, the value of local siting justifies the cost of additional environmental controls.

As such, "environmental comparability" impedes the ability of state and federal officials to achieve the objectives of (I) improving air quality in severely impacted areas, and (ii) overall economic efficiency in the generation market. Where Commonwealth electric customers can economically and environmentally benefit from power generated in a more environmentally suitable locale, such a transaction should be encouraged rather than discouraged. In so doing, the Commonwealth is utilizing the ability of in-state consumers to import power to avoid the air quality impacts of local generating plants where local plants do not add sufficient locational value. This also provides the Commonwealth with an enhanced ability to site more suitable and profitable industry within the state -- creating more new jobs and generating more tax revenue -- with equal or lower local environmental impacts. In fact, a competitive market structure that does not impose artificial barriers, such as a "comparability" standard, will underscore the commercial benefit of providing local generation and voltage support that are not applicable to out-of-state competitors. This may offset cost differentials that may exist

between sources subject to different local air emissions standards.

Further, and perhaps most importantly, there is absolutely no evidence to support the contention made by proponents of "environmental comparability" that such a policy will produce environmental benefits. In fact, there is no assurances that there will be any change in emissions levels nationally simply because Massachusetts chooses to impose comparable emissions requirements on its own market. This will only result in higher-priced electricity for Commonwealth electric customers while customers in other states enjoy the benefits of industry restructuring and open access transmission policies that do not impose these additional costs. National Ambient Air Quality Standards ("NAAQS") are federal standards that are, and should continue to be, established on a nationwide basis.[7]

Finally, it should be understood that the national debate over the scope and impact of the regional transport of emissions is the subject of heated debate and will continue to be so due to the lack of scientific evidence and data necessary to draw a reasonable and efficient conclusion regarding the most efficient means of dealing with

[7]In June of 1995, the Environmental Protection Agency ("EPA") convened discussions among the air quality agencies of the 37 eastern-most states in the U.S. to review the need for NOx emission reductions in upwind states that may be contributing to air quality violations in downwind states. This fast-track process, known as the Ozone Transport Assessment Group ("OTAG"), currently aims to impose emission controls that go beyond Reasonably Available Control Technology ("RACT") and other utility NOx controls already required under the CAAA for the 37 states, most of which will be implemented by 2005. An emissions "cap and trade" program, similar to the acid rain program authorized by Congress in 1990, is also under discussion. The critical difference between the acid rain program and the NOx program under discussion is that Congress did not authorize a 37-state ozone cap and trade program, particularly at control levels that go well beyond RACT. The annual cost for this level of NOx reduction will be two to three times more expensive than the acid rain control program Congress enacted in 1990 after a decade of debate due to the critical importance of the economic impacts of that proposal on the U.S. economy.

air emissions issues. This point was underscored recently in the OTC process where it was determine that additional data and better models were needed to improve regional emission reduction planning and to achieve maximum cost and environmental effectiveness.[8]

Seeking the imposition of emission controls at power plants outside of Massachusetts when such controls cannot ensure that the NAAQS for a criteria emission, such as ozone, will be met as a result of the contribution of out-of-state reductions, may needlessly increase the cost of electricity to Commonwealth customers

[8]In order to assist with the cost-effective development of emissions control or reduction policies, the North Amercian Research Strategy for Tropospheric Ozone ("NARSTO") was initiated to improve our knowledge concerning ozone and its precursors. The NARSTO - Northeast Project has been underway since the summer 1995 ozone season and extensive information is being collected over an intensive 3-year period to assist in determining what the most cost-effective emissions reduction program will be for the OTR. NARSTO will also provide extremely critical and valuable data that is expected to vastly improve our ability to predict air current patterns, pollutant transport information and boundary conditions, thus revealing the emissions sources from which further controls will be most beneficial. One of the important tasks being considered by OTAG is the development of improved emissions inventory data collection. The information and recommendations developed in this regard from the OTAG process, together with the scientific findings of NARSTO, will lead to more efficient, effective and economic resolution of the ozone non-attainment problem in Massachusetts.

Until that time, existing modeling indicates that mobile and area sources within the OTR are responsible for at least 70 percent of the baseline NOx emissions and 75 percent of NOx emissions after CAAA reductions from out-of-region sources have been factored in. While the OTC, OTAG and EPA continue to pursue NOx emissions reductions from major stationary sources within and outside of the OTR, emissions from uncontrolled or under-controlled local sources of NOx and VOCs in Massachusetts continue to contribute to non-attainment in the state. It is important to understand that the OTC MOU is predicated upon emissions studies showing that additional controls on powerplant NOx emissions alone will not be sufficient to allow some states located within the OTR to demonstratee attainment with the federal ozone standard and that additional controls on other local emissions sources will be necessary to demonstrate attainment. It will be particularly important that the Commonwealth can demonstrate that this is being accomplished if it is to justify further reductions in other states (that are in attainment with the federal standard) on the basis of the impact of transboundary emissions.

without efficiently providing the accompanying environmental benefits. The imposition of environmental environmental compliance policies and standards on the electric marketplace should not even be considered as an option by the Department, particularly if they cannot be justified as economically and scientifically sound. Too often, inefficient decisions are made without proper data or research and, as a result, consumers bear the burden of poor results at too high of a cost.[9]

B. IMPOSITION OF COMPARABLE ENVIRONMENTAL STANDARDS ON SUPPLIERS POSES SERIOUS CONSTITUTIONAL QUESTIONS AND THREATENS TO DELAY INDUSTRY RESTRUCTURING IN THE COMMONWEALTH.

The imposition of equal environmental standards on participants in the interstate electric supply market by a state for competitive purposes would encourage an interstate commerce challenge that could significantly delay the Department's efforts to implement regulatory reform, thus compromising the ultimate objectives of competitive industry restructuring.

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[9]For example, a November 1995 study performed by Energy Ventures Analysis, Inc. on the impact of imposing the MOU Phase III requirements (75 percent reduction of NOx emissions from existing sources) on the 37-state OTAG region found that: (1) available ambient air quality data in many eastern urban locations indicated that the proposed NOx controls may contribute to increased ozone levels because NOx is a scavenger of ozone as well as a precursor; (2) reducing NOx emissions in the 37-state area would significantly increase the cost of generating electricity by $4.0-5.5 billion annually; and (3) that the 37-state proposal would require $18-26 billion in new capital investment. As a result, the study concluded that there would be significant economic and employment disruptions across the OTAG region if comparable environmental standards were imposed, including states where no air quality compliance problems currently exist.

In addition, existing EPA models indicate that the imposition of controls, as proposed above, would only produce negligible benefits within the northeastern and mid-Atlantic regions -- approximately 3 to 9 parts per billion for the most part on a few hot summer days. The Energy Ventures study also found that facts demonstrated that utility NOx emissions are not the major contributor to urban air quality problems.

As illustrated in section A. above, the issue of "environmental comparability" is difficult to justify and debate on its environmental merits in the absence of federal policy that would prevent suppliers from legally entering other markets due to their ability to meet prevailing federal standards. To date, CEED is not aware of any evidence supporting the conclusion that the imposition of comparable environmental standards by the Commonwealth will produce any environmental benefits within the Commonwealth. The Department should, therefore, be concerned that the primary objective behind the support of comparable environmental requirements by such by companies such as MECo is a commercial one.

The imposition of standards or tariffs on out-of-state suppliers for competitive purposes encourages an interstate commerce challenge. The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce among the several States." U.S. Const. Art. 1, §8, cl.3. While the clause is silent as to how much power a state retains to regulate economic activities within its borders, for more than one hundred years, the United States Supreme Court has held that the Commerce Clause also includes a prohibition on states from taking certain actions even absent congressional action. Thus, this "dormant" commerce clause would forbid Massachusetts from taking an action to protect in-state economic interests from out-of-state competition.

In the context of a Commerce Clause case, the presiding judge observed that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division," Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). Thus,

the clause has been applied to assure that no state can thwart the ideal that the basic economic unit is the nation and that "the future of our Nation depends not on how certain parts of it fare but on how it does as a whole." Dutchess Sanitation Serv. Inc. v. Town of Plattekill, 417 N.E. 2d 74, 76 (N.Y. 1980). It has also been found that a state statute may violate the Commerce Clause either by discriminating against out-of-state economic interests or by benefitting in-state interests. See Baccus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984).

Proponents of import rates argue that, pursuant to City of Philadelphia v. New Jersey [437 U.S. 617, 624 (1978)], the court must determine whether the challenged portions of a legislative Act or regulation are just "protectionist measure[s], or whether [the Act] can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." The states retain authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. Lewis 477 U.S. at 36; Maine v. Taylor 477 U.S. 131, 138 (1986).

When such a state regulation is challenged as a violation of the dormant Commerce Clause, it will be subjected to one or two tests, depending upon the discriminatory nature of the statute. The first test applies if a statute is discriminatory on its face or in practical effect. The state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) non-discriminatory alternatives, adequate to preserve the legitimate local purpose, are not available. See Hughes v. Oklahoma [(1979)], 441 U.S. [322,] 336; Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

Thus, those who would argue that the imposition of import rates is a matter of legitimate local concern because of the inability of Massachusetts to meet the requirements of the CAAA would bear the burden of proof that alternatives, such as stiffer restrictions on other local sources of ozone-producing emissions within the Commonwealth, are not available.[10] It would be unfortunate if the benefits of electric industry restructuring were to be postponed in Massachusetts due to the imposition of a standard that, on its face, appears to be difficult to justify based upon the federal standards established to ensure that U.S. consumers benefit from commerce between the states.

CONCLUSION

CEED strongly urges the Department to not to adopt a requirement that comparable environmental standards in any form be a pre-condition for electric suppliers to participate in wholesale or retail markets established within the Commonwealth as a result of industry restructuring and, more specifically, this Rulemaking. CEED reiterates that:

> The primary goal of the Department in restructuring the electric services industry should be to obtain and sustain an industry structure that promotes competitive pricing, reliability, and innovative product and service options.
>
> The price and performance implications of environmental initiatives must be carefully balanced with the Department's economic charge and goals if effective and efficient competition is to be promoted within the Commonwealth.

[10] In this regard, it is worthwhile reiterating here that the OTC MOU was predicated, in part, upon emissions modeling studies showing that additional controls on powerplant NOx emissions alone would not be sufficient to allow some states within the OTR to demonstrate attainment with the federal ozone standard and that additional controls on other local emissions sources would be necessary to demonstrate attainment.

The imposition of restrictions on any market can compromise the ability of that market to perform efficiently, with the nearly certain outcome being higher prices.

The imposition of restrictions on a state's electric market could eliminate the economic advantages of federal open access wholesale transmission policy and state electric industry restructuring initiatives ***without*** providing the desired environmental benefits.

The imposition of comparable environmental standards, requirements or tariffs on suppliers providing electricity to Commonwealth consumers, alone, is likely to result in higher in-state electric prices while consumers in out-of-state markets enjoy the benefits of lower prices and more robust economic growth.

The adoption of "equal" emissions standards, in a world where diverse environmental conditions exist, removes any incentive to site or retrofit major sources of air emissions in an environmentally-efficient manner (i.e., siting projects where operations will not exacerbate severe local air quality conditions.)

The imposition of standards or tariffs on out-of-state suppliers for competitive purposes encourages an interstate commerce challenge that could significantly delay state efforts to implement regulatory reform initiatives.

The adoption of an approach that imposes state environmental standards on an interstate marketplace will seriously impact the ability of Commonwealth ratepayers to benefit from an open access environment without producing any significant environmental benefits for the Commonwealth.

Once again, CEED applauds the Department's inclusive approach to undertaking the complex issues associated with regulatory reform. CEED looks forward to participating in this Rulemaking and hopes that its viewpoints and perspectives will contribute to a more balanced understanding of the environmental issues under discussion as well as the successful implementation of industry restructuring in the Commonwealth of Massachusetts.

Respectfully submitted,

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